RECENT CASES

BAILMENTS.

Liability of Hotelkeeper for Valise Left at the Hotel

Bean v. Ford, et al., 119 N. Y. S. 1074 (January, 1910). The plaintiff, not a guest at a hotel, left a valise there in custody of one having charge of the coatroom of the hotel, and obtained a receipt therefor, which expressly relieved the proprietor of the hotel from liability for damage by fire, water, theft, or other causes, and upon his return five months later, the valise having inexplicably disappeared, sued the proprietors of the hotel and recovered. The Court made the following points: (*a*) The rules of liability between innkeepers and their guests did not apply in determining the liability for a loss of the valise; (*b*) the proprietor was liable for his own negligent loss of the package, for a stipulation in an agreement written by one of the parties thereto in his own language must be construed strongly against him; (*c*) the failure of the gratuitous bailee to produce the goods when called for by the bailor was evidence of the bailee's negligence; (*d*) a gratuitous bailee is liable for negligence which is the failure to use the care which ordinarily prudent persons would exercise in the same relationship and under like circumstances.

The reason for the imposition on the innkeeper of an extraordinary liability for the protection of the baggage of his guest is the profit he receives from entertaining his guest, and when the traveler ceases to be a guest and the innkeeper ceases to derive a profit from his entertainment, the relations of innkeeper and guest have ceased, and as a consequence, their relative liabilities. *O'Brien* v. *Vaill*, 22 Fla. 627 (1887); *Glenn* v. *Jackson*, 93 Ala. 342 (1890.)

Adams v. *Clem*, 41 Ga. 65 (1870) is a doubtful case. It holds that if a guest, departing from the inn, leaves baggage with the innkeeper with his consent, that the latter is liable for its safe keeping as an innkeeper, for a reasonable time, according to the circumstances of the case.

Where the relation of innkeeper and guest have been terminated, the former guest cannot hold the innkeeper responsible for the loss of his valise, which occurred after he ceased to be a guest of the inn. *Miller* v. *Peoples and Branum*, 60 Miss. Sup. Ct. 819 (1883).

The case of *Hoyt* v. *Clinton Hotel Co.*, 35 Pa. Super. 297, (1908), is similar to *Bean* v. *Ford*, with the addition that the owner of the baggage remained a guest of the hotel between the time of checking and of discovering the loss. The hotel was held responsible in spite of a regulation exempting itself from liability in such cases. This case, however, was decided chiefly on the liability of a bailee. The rule that a bailee may not by special contract relieve himself against his own fraud or negligence applies not only to common carriers, but also to bailees who for hire take the property of others into their care.

The decision in *Bean* v. *Ford* is reached on the ground that the inability of a bailee to produce the bailor's goods when called for is of itself evidence of negligence on the part of the bailee, and if the bailee fails to prove the precise manner in which the loss occurred, it will not avail him to prove that he had an elaborate system for the

BAILMENTS (Continued).

care and safe-keeping of baggage left in his charge. *Burnell* v. *N. Y. C. R. R. Co.*, 45 N. Y. 184 (1871). *Steers* v. *Liverpool S. S. Co.*, 57 N. Y. 1, (1874); *Fairfax* v. *N. Y. C. & H. R. R. R. Co.*, 67 N. Y. 11, (1876); *Claflin* v. *Meyer*, 75 N. Y. 260, (1878.)

Gross negligence as applied to gratuitous bailees is nothing more than failure to bestow such care as property in its situation demands. *Chicago Hotel Co.* v. *Bauman*, 131 Ill. App., 324, (1907.)

CORPORATIONS.

Convertible Bonds: Rights of Holders

The plaintiff, the holder of bonds, convertible into the stock of the corporation issuing them, on designated dates, brought a bill in equity to enjoin the payment of a dividend on outstanding stock, as illegal. The Court held that he could not question the action of the corporation in declaring the dividend, as he was a mere creditor of the corporation and had no legal or equitable interest in the stock before exercising his option. *Gay* v. *Burgess Mills*, 74 Atl. 714, (R. I.).

The option in a convertible bond, though accessory to the principal obligation (*Loomis* v. *Ry.*, 97 Fed. 755), is separate therefrom (*Hotchkiss* v. *National Banks*, 88 U. S. 354; *Welch* v. *Sager*, 47 N. Y. 143). It is a standing unaccepted offer on the part of the corporation to exchange the bond for stock upon the holder's complying with certain conditions. It gives the holder no interest in the stock or rights as a stockholder. *Pratt* v. *Tel. Co.*, 141 Mass. 225; *Chaffee* v. *R. R.*, 146 Mass. 224. So he cannot share in a dividend (*Sutliff* v. *R. R.*, 24 Ohio 147; *Union Screw Co.* v. *Am. Screw Co.*, 11 R. I. 569), nor can he question any action of the corporation that affects the value of the stock. *Parkinson* v. *St. Ry.* 173 Mass. 446.

Such an option is spoken of as irrevocable (*Lisman* v. *Ry.*, 161 Fed. 472, 475), and this seems sound on principles of contract law as the option is supported by the consideration given for the bond. The bondholder can, however, surrender his option and this was held to have been the effect of his consent to a consolidation that rendered the conversion impossible. *Tagart* v. *Ry.*, 29 Md. 557.

In spite, however, of the irrevocable nature of this option, there are two cases which indicate that the bondholder cannot complain of any action of the corporation, as a result of which it ceases to exist in any practical sense, and can therefore not fulfil its engagement to convert the bonds. *Lisman* v. *Ry.*, 161 Fed. 472; *Welles* v. *Ry.*, 163 Fed. 330. To be sure, in the former the Court said that the corporation had merelv done an act that rendered impossible the declaring of a dividend, which was a condition precedent to the exercise of the option, and in the latter the bond issue was void, but the language of the Court in both cases seems to recognize the principle that it is competent for the corporation to disenable itself from fulfilling its undertaking. A satisfactory ground for this proposition is given by the Court in *Lisman* v. *Ry.*, *supra*, where Quarles, Dist. J., points out that the contract between the corporation and the bondholder must be taken to contemplate all legal modes of dissolution and consolidation existing at the time the bond is issued, and therefore if the policy of the management of the corporation demands that it be dissolved or consolidated, such dissolution or consolidation does not violate the contract of the bond.

CRIMES.

Using Mails to Defraud

Under Rev. St. §5480, that use of the mails for "schemes or artifices to defraud," which is criminally punishable, is only such use as contemplates the depriving of the person addressed of some right or thing which he already possessed; *Miller* v. *U. S.*, 174 Fed. Rep. (C. C. A. 1909) 35. Here, in order to sell an increased issue of stock, defendants, officers of a *bona fide* manufacturing corporation, mailed letters representing that the company desired to secure managers for branch houses, and making false representations as to the profits and dividends of the company. By means of these representations, stock was sold to certain persons. As said, an indictment which charged these facts, and that the statements were knowingly false, was held insufficient because it was not charged that the stock was not worth the price paid for it.

In other words, under the statute, there must exist not only fraudulent representations, knowingly made, but the person addressed must suffer actual damage therefrom. Other recent cases: *Diveland* v. *U. S.*, 161 U. S. 306; *Brooks* v. *U. S.*, 146 Fed. 223.

EQUITY.

Specific Performance: Contract for Sale of Land: Marketable Title Affected by Mutual Will Executed Pursuant to Contract

A decedent and his wife duly made and executed a document as their last will and testament, devising all their several property, real and personal, to the survivor, with a provision that at his or her death it should be sold and the proceeds divided equally between the heirs at law of each. After death of the husband, the wife entered on all his property, remarried, conveyed all the property to her then husband and died, leaving a new will revoking the former. The second husband died, devising the property in question to C, who conveyed to the plaintiff. The latter entered into a contract in writing to convey the property to the defendant, and now brings his bill for specific performance. *Held:* The plaintiff's title is not marketable, as such mutual will of husband and wife if based on sufficient consideration, evidences that which a Court of Equity will enforce for the heirs of the husband, regardless of the wife's attempt to repudiate the same by her second will. Bill dismissed. *Deseumeur* v. *Rondel*, 74 Atl. (N. J. 1909) 703.

It is well established that agreements to make mutual wills are valid. *Dufour* v. *Percira*, 1 Dick, Ch. 419 (1769); *Dutton* v. *Poote*, 2 Freeman, 285. However, the general rule is that the effect of such agreements is not to render wills made in pursuance of them irrevocable. *Wyche* v. *Clapp*, 43 Tex. (1875) 543; *Robinson* v. *Mandell, et al.*, 3 Cliff. (C. C. 1868) 169, 183; *Hobson* v. *Blackburn*, 1 Add. Eccl. 274; 1 Jarman, Wills 27. But they may be enforced in equity against the estate of the defaulting party after his decease, *Izard* v. *Middleton*, 1 De Saus. (S. C. 1785) 116, the acceptance by the surviving partner of the provisions of the mutual will, making the agreement a binding contract on the survivor, *Dufour* v. *Percira, supra; Jones* v. *Martin*, Anst. Rep. 882; *Cawley's Estate*, 136 Pa. (1890) 628. The agreement may be enforced by a residuary legatee in the mutual will against the legatees or legal representatives of the testator who survived the other and then made another will. *Edson* v. *Parsons*, 50 N. E. (N. Y. 1898) 265, on the ground of an attacking equitable trust. *Wyche* v.

EQUITY (Continued).

Clapp, supra. But to enforce the same, the burden of proving the agreement, the consideration, etc., rests upon the claimant, and it will not be enforced unless definitely established. *Lord Walpole* v. *Lord Orford,* 3 Ves. Jr. 402 (1797). It is of course, the contract based upon a sufficient legal consideration, that is enforced, the will being revocable, that being the nature of a testamentary paper. 1 Story Eq. Jur. §785; 1 Williams Exrs. 104; and see *Logan* v. *McGinnis,* 12 Pa. (1849) 27, to enforce a similar contract, and *Gould* v. *Mansfield,* 103 Mass. (1869) 408, where it is held that an oral promise to make a mutual will in consideration of the execution of the same by another, is a contract for the sale of lands within the Statute of Frauds. But though as a will, it is revocable, it is held that neither party can properly revoke it without giving notice to the other of each revocation. *Robinson* v. *Mandell, et al., supra.*

The decision in the principal case seems undoubtedly sound: where a vendor seeking specific performance is unable to offer vendee a marketable title or one the validity of which is free from reasonable doubt, a decree will be denied. *Watts* v. *Waddle,* 6 Pet. (U. S.) 389; *Speakman* v. *Forepaugh,* 44 Pa. (1862) 363; *Evans* v. *Taylor,* 39 W. N. C. (Pa.) 206. Nor can the vendee be compelled to accept title as to which there is a present reasonable ground to apprehend litigation. *Daniels* v. *Shaw,* 166 Mass. 582. And as a defense to the bill, the vendee need not conclusively establish the defect. *Griffin* v. *Cunningham,* 19 Gratt (Va.) 571. The question is more difficult where all the parties whose interest might be affected by a decree are not properly before the Court, and the Court may well deny the bill in such case. *Cornell* v. *Andrews,* 35 N. J. Eq. 7.

The right of the heirs of the first husband as to the property in the principal case, is at least one reasonably open to honest and present litigation, and they are not now before the Court. In fact under the authorities, the facts of the case would seem to be sufficient to show a conclusive defect in the plaintiff's title, to render it bad as well as unmarketable. The decree was therefore, properly refused, the Court not being called upon to pass on the effect and force of the mutual will.

EVIDENCE.

Declaration of Grantor: Good Faith of a Deed

A grantor while giving instructions to a scrivener for drawing the deed, made a statement as to the consideration therefor, at variance with the consideration as it appeared in the deed. The grantee was absent and it did not appear what circumstances brought out the statement. *Held,* the declaration was hearsay, and was not admissible as part of the *res gestae,* in an action between the grantee and a creditor of the grantor, alleging fraud. *Johnson* v. *Spoonheim,* 123 N. W. (N. D. 1909) 830.

An essentially parallel case came before the Pennsylvania Court in 1834, and the principal case is in accord with the decision there reached. *United States* v. *Mertz,* 2 Watts 406. Gibson, C. J., says, "There is an intuitive exception to the competency of exculpatory protestations by a party charged with fraud." To secure their admission in evidence it must appear that they were explanatory of an act concomitant with the fact in issue and so part of the *res gestae. Idem, Louden* v. *Blythe,* 16 Pa. (1851) 532. The proper test of a declaration as part *res aestae,* seems to be generally recognized in the inquiry whether

EVIDENCE (Continued).

the declaration is explanatory of, *Smith* v. *National Beneficial Society*, 25 N. E. (N. Y.) 197, and extemporaneous with a fact, *Cox* v. *State*, 64 Ga. 374, *Elkins* v. *McKean*, 79 Pa. 493, which is itself a part of the *res gestae;* a fact concomitant with this fact at issue, *Murray* v. *R. R.*, 54 Atl. (N. H.) 32, and also independently material to the issue. *Lind* v. *Tyngsborough*, 9 Cush. (Mass.) 36; *Pinney* v. *Jones*, 30 Atl. (Conn.) 762; *Shannon* v. *Castner*, 21 Pa. Sup. Ct. 294.

If this test be sound, two objections exist to the admission of the declaration in question as part of the *res gestae*. The issue is fraud and the existence of a real consideration. The declaration accompanies the act of securing the drawing of the deed by a scrivener. The employment of a scrivener is not a fact itself independently material to the issue. *United States* v. *Mertz, supra*. Moreover, the declaration is not explanatory of such act, the employment of a scrivener being an unequivocal act, and uncharacterized by the substance of the declaration. *Printup* v. *Mitchell*, 17 Ga. (1855) 558, showing that the act must be one material to be understood and the declaration made at the time thereof and expressive of its character or motive. Upon these views the principal case seems soundly decided. Complete harmonizing of the cases is, however, impossible. In *Kingsford* v. *Hood*, 105 Mass. 495, in an action to determine which of two persons of the same name as the grantor was intended, the drawing of the deed by a scrivener was held immaterial and irrelevant and so declarations made at that time were excluded. And so, *Trimmer* v. *Trimmer*, 13 Hun (N. Y.) 182, a conversation with a scrivener has no necessary connection with the act of signing or delivering a deed and no legitimate tendency to characterize and qualify the deed. On the other hand, it has been held that declarations made under the circumstances of the present case are admissible. *Kennedy* v. *Phillipy*, 91 Ind. (1883) 511. And it is generally held that declarations made at the time of executing a deed, are admissible as part of the *res gestae* when explanatory of reasons for the conveyance, *i. e.*, of the execution of the deed. *Lewars* v. *Weaver*, 15 Ath. (Pa.) 514; *Wilcoxen* v. *Morgan*, 2 Colo. 473. And also declarations at time of the transfer of the property, *York County Bank* v. *Carter*, 38 Pa. (1861) 446, but see *Hoover & Gamble* v. *Cary*, 53 N. W. (Iowa, 1892) 415, declarations at time of delivery of property excluded.

Beneath the theory of the cases, if a true theory can be formulated from the cases alone, the motive of the decisions in accord with the principal cases is aptly stated by Chief Justice Gibson, "If such communications were admitted into the jury box, they would never be wanting as a preparatory step to collusion and their effect would be fatal to justice." *United States* v. *Mertz, supra.*

INSURANCE.

Rights of Mortgagee Under a Mortgage Clause

The Supreme Court of Ohio in the case of the *Erie Brewing Company v. Ohio Farmers' Insurance Company*, 89 N. E. (Ohio) 1065 (1909) decided recently, that a mortgagee was bound by arbitrations between the insured and the company, although he was not a party thereto. The policy of insurance in question provided in the case of a dispute as to the loss, that it should be settled by arbitration, the insured choosing one arbitrator, the company another, they together to pick a third. It also contained a mortgage clause,

INSURANCE (Continued).

which made losses, if any, payable to the mortgagee, as interest may appear. The Court held, that the contract between the insured and the company must be observed except as modified by the mortgage clause, and since the arbitration clause was in no way modified, it is in full force and it is not necessary to make the mortgagee a party to the arbitration. The reasoning seems logical; the difficulty is, the weight of authority in such cases is the other way. The jurisdictions and cases taking the opposite view are as follows: *Bergman* v. *Assurance Co.* 15 L. R. A. (Ky.) 270 (1892), affirmed in a later decision; *Insurance Co.* v. *Stein*, 72 Miss. 943 (1895); *Brown* v. *Insurance Co.* 5 R. I. 394 (1858); in this case, however, the mortgage clause is treated as an assignment; *Harrington* v. *Insurance Co.* 124 Mass. 126 (1878); *Hall* v. *Fire Association*, 64 N. H. 405 (1887), and *Hathaway* v. *Orient Insurance Co.* 134 N. Y. App. 409 (1892).

The Ohio Court in support of its reasoning cited dictum from a Massachusetts case. We have already seen that on this precise question Massachusetts takes the other view. A Wisconsin case taking the Ohio side is also cited and spoken of approvingly. Unfortunately the review of authorities in that case is inaccurate, *Hall* v. *Fire Association* being badly misunderstood.

Under the facts of our principal case, the mortgage debt was less than the amount of the insurance carried and the Court evidently thought the insurance money was not needed as badly to protect the mortgage debt, as it would have been, had the debt exceeded the insurance. A distinction like this may be drawn but it seems somewhat narrow.

NEGLIGENCE.

Last Clear Chance Doctrine

In the case of the *Little Rock Railway and Electric Co.* v. *Billings*, 173 Fed. 903 (1909) the plaintiff, while intoxicated, was walking along the track of defendant company. He was struck by a trolley car coming toward him and was severely injured. The car was equipped with an electric headlight burning brightly and the motorman could and did see him two hundred feet away. One of the questions involved was the application of the so-called "last clear chance" doctrine. It may be stated as follows: "He, who by his own negligence has placed himself in a position of imminent peril, of which he is either unconscious or from which he is unable to extricate himself, if conscious, may not be carelessly, recklessly, or wantonly injured by another, who, after he has discovered the former's helpless condition has it in his power to avoid it." This was first enunciated in *Davies v. Mann*, 10 M. and W. (Exch.) 545 (1842). It has been generally followed and the Court cites a number of cases which illustrate it. The appellate court in this case approved of the doctrine but reversed the judgment, because the charge of the trial judge tended to lead the jury to suppose that the plaintiff by virtue of his voluntary intoxication was in a better position than if he had been sober as regards contributory negligence. The law, it was said, does not show such partiality.

NEGLIGENCE (Continued).

Turntable Cases

The Court of Appeals of Kentucky, in *Brown* v. *C. & O. R. R.* 123 S. W. (Ky. 1909) 298. has strongly reaffirmed the doctrine of the turntable cases as laid down in *R. R.* v. *Stout*, 17 Wall. 657. In one leading case a boy of 12 years lost a foot while playing on the turntable, located about 65 feet from the highway. The acts of his companions in putting it in motion, were not the proximate cause of his injury, *R. R.* v. *McWhieter*, 77 Tex. 356, and the Court held the defendant liable for his failure to anticipate and take precautions against the presence of child trespassers.

It is impossible to agree with many recent commentators that the courts are ready to depart from the "turntable doctrine." For other recent cases in accord, in England and (apparently) in Pennsylvania, see Univ. Penna. Law Review, Vol. 58, No. 4, p. 233.

NUISANCE.

"Spite Fences": Malicious Motives

A and B owned adjoining lots. B on his own land erected a high board fence near the division line so as to cut off the light and air from A's windows. The fence was erected by B for no useful or ornamental purpose, but for motives of pure malice toward A. *Held*, in an action at law by A against B, that the fence was a nuisance and A was entitled to recover damages. *Barger* v. *Barringer*, 66 S. E. Rep. (N. C.) 439. (1909.) These "spite-fences," as they are commonly called, have been the subject of frequent litigation. The decision in our principal case rests flatly on the theory that malice will make a lawful act unlawful, or as the Court prefers to put it, "A wilful or wanton damage done to another is actionable, unless there is some just or legal excuse for it." The reasoning in this opinion is hard to justify in view of a previous decision in the same State, *Richardson* v. *R. R. Co.*, 126 N. C. 100 (1900), where it is said that "malice disconnected with the infringement of a legal right is not actionable." Since by another previous decision, *Lindsay* v. *Bank*, 115 N. C. 553 (1894), it is established that an easement of light and air cannot be acquired by prescription, it cannot be said that a legal right of the plaintiff was here infringed. The same rule has been adopted in several other jurisdictions, especially Michigan, where it is firmly established by a line of cases. *Burke* v. *Smith*, 69 Mich. 383 (1888); *Flaherty* v. *Moran*, 81 Mich. 52 (1890); *Peek* v. *Roe*, 110 Mich. 52 (1896); *Peck* v. *Bowman*, 22 Ohio Law Journal 111.

The weight of authority is clearly against this view, holding that a man has an absolute right to build on his property as he will. The chief argument of these cases is that allowing a man to injure his neighbor by a building erected for a beneficial purpose but enjoining him, when it is erected entirely from a malicious motive "is not protecting a legal right, but is controlling his moral conduct." The Courts have preferred the hardship of individual cases to allowing recovery on the sole ground of malice. *Letts* v. *Kessler*, 54 Ohio St. 73 (1896); *Pickard* v. *Collins*, 23 Barb. 458 (1856); *Fallou* v. *Schelling*, 29 Kan. 292 (1883); *Metzger* v. *Hochrein*, 50 L. R. A. 305 (1909).

The cases of maliciously drawing off the underground, percolating waters on one's land and thereby drying up a neighbor's well, involve the same principles. This has been enjoined from the earliest times, if done with the sole and malicious purpose of injuring one's neighbor.

NUISANCE (Continued).

Chasemore v. *Richards*, 7 H. L. Cases 349 (1880); *Wheatley* v. *Baugh*, 25 Pa. 528 (1855); *Chesley* v. *King*, 74 Me. 164 (1882). Here, however, the ground of decision is not the defendant's immoral motive, but a limitation of his property rights, which he has exceeded. In other words a man has not an absolute right to the percolating waters under his land, but can only consume them for the beneficial use of himself and the land on which it is collected. If he exceeds such right, anyone thereby injuriously affected can enjoin him, whatever his motive may be. It has been suggested that if this doctrine were applied to the "spite-fence" cases, the decision of our principal cases could be legally justified, and a more equitable result be attained. *Pomeroy's Eq. Jur.*, vol. 5, §528.

In many States, statutes have been passed prohibiting the malicious erection of such a fence. The constitutionality of these statutes has been frequently questioned, but they have invariably been sustained. *Rideout* v. *Knox*, 148 Mass. 368 (1889); *Hunt* v. *Coggan*, 66 N. H. 140 (1889); *Karasek* v. *Peier*, 22 Wash. 419 (1900). In these cases the malicious motive must be the predominant cause, so that without it the fence would not have been built and maintained. If other worthy motives are present and malice also, it will not come within the statutes. *Lord* v. *Langdon*, 91 Me. 221 (1898); *Gallagher* v. *Dodge*, 48 Court. 387 (1880).

SALES.

Pledge by Agent: Effect of Factor's Acts

A traveling salesman was intrusted with goods by the plaintiff on the terms of a letter written by the salesman in which he admitted that he had the goods from the plaintiff "on sale or return," that the goods were the property of the plaintiff and that they were left with him for the purpose of sale and were in no event to be kept as his own stock. On sale of the goods the agent was to remit to the plaintiff the cost price of the goods and one-half of the profits. The agent wrongfully pledged the goods to secure an advance and the plaintiff brought this action to recover them. The Court held that the words "on sale or return," when read with the letter as a whole, precluded any idea that the agent was to be purchaser. In fact under the terms of the agreement he could never be purchaser. The proper interpretation of the agreement was that a sale *by* the agent was intended and not a sale *to* him. The agent was agent for the purpose of sale and was, therefore, a "mercantile agent" within the meaning of the Factor's Act of 1889, and the defendant, an innocent purchaser from the agent, received a good title. *Weiner* v. *Harris*, 101 Law Times (Eng., 1909) 647.

This case presents the general question how far one who has no title can confer title on another. At common law the broad rule was that he who had no title could give none. To this there were a few exceptions, such as sales in market overt, transfers of negotiable instruments under certain circumstances and cases of estoppel. This last case has often been before the Courts and is alive with difficult distinctions. Under the common law rule mere possession gave no authority to pass a good title, and the true owner could reclaim the goods.

It is often laid down as a principle of law that he who has enabled another to deceive third persons should bear the loss. How far this is true is not easy to determine. But it seems that this so-called prin-

SALES (Continued).

ciple is true only where an estoppel has been created against the owner. Delivery of goods to a factor under the common law gave the factor no right to pledge them and the pledgee could get no title against the true owner, even though the factor was authorized to sell. *Frantz Co.* v. *Winehill Co.*, 50 So. Rep. (La., 1909) 650; *Paterson* v. *Nash*, 2 Strange, 1178; *Cole* v. *Northwestern Bank*, L. R. Lo. C. P. 354. Delivery of goods to a bailee carried with it no right to pledge, *Cole* v. *Northwestern Bank, supra.* The same rule applies as well to documents of title as to the goods themselves. *Martini* v. *Coles*, 1 M. & S. 140; *Allen* v. *St. Louis Bank*, 120 U. S. 20. The owner must give the factor or agent authority either express or implied to deal with the goods or documents of title as his own and so deceive the public. Nothing less than this will at common law prevent the true owner from asserting his title.

The Factor's Acts which have been passed by Parliament in England and by the Legislatures of many of the United States to remedy this condition, being in derogation of the common law, have been very strictly interpreted by the Courts. As a consequence Parliament was forced to pass new acts to carry into effect their intention and to avoid the results of decisions limiting the operation of the previous statutes. The last of the Factor's Acts, 52 and 53 Vict. C. 45, 1889, which consolidated and extended the prior acts, provides that "where a mercantile agent is, with the consent of the owner, in possession of goods or documents of title to goods, any sale, pledge or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same. "Though the statutes of the States which have enacted Factor's Acts do not follow the wording of the English act, the general effect is the same. But particular differences must be ascertained by an examination of the different statutes. See N. Y. Laws, (1830) c. 179; Mass. Rev. Laws (1902) c. 68; Pa. Brig. Purd. Dig. (1894) p. 867; Me. R. S. (1903) c. 33; Md. Pub. Gen. Laws (1904) Art. 2; Ohio Bates An. St. Secs.3214-3220; R. I. Gen. Laws (1896) c. 158; Wisc. S. & B. An. St. Sec. 3345.

The general intention is to afford protection to innocent purchasers buying from agents who are intrusted with possession. The rule of the common law is not altered unless the agent be intrusted with the goods for the purpose of sale, *Cole* v. *Northwestern Bank, supra*; *Thacher* v. *Moors*, 134 Mass. 156; *Prentiss Co.* v. *Page*, 164 Mass. 276. The possession must be actual as distinguished from constructive. *Howland* v. *Woodruff*, 60 N. Y. 73. Under the English Act the vendee in a conditional sale also can pass a good title to a *bona fide* purchaser without notice. *Lee* v. *Butler*, (1893) 2 Q. B. 318; but this is not true in this country (Williston, Sales, Sec. 324) except in a few jurisdictions. *Van Duzor* v. *Allen*, 90 Ill. 499; *Lincoln* v. *Quinn*, 68 Md. 299; *Dearborn* v. *Raysor*, 132 Pa. 231. The possession must have been obtained with the owner's consent, *Hazard* v. *Fiske*. 18 Hun. 277; without notice, *Stevens* v. *Wilson*. 3 Denio, 472. and without fraud. *Prentiss Co.* v. *Page, supra.* It is otherwise in England. *Shepherd* v. *Union Bank*, 7 H. & N. 661; *Baines* v. *Swainson*, 4 B. & S. 270. In *Prentiss Co.* v. *Page, supra,* the Court distinguished *Baines* v. *Swainson, supra,* on

SALES (Continued).

the ground that the English Act simply provided that the goods be "instrusted" witl. the agent and not, like the Massachusetts Act "intrusted for sale." But it is submitted that this is not correct, as section 2 (1) of the Consolidated Act expressly defines a "mercantile agent" as one "having in the customary course of his business authority either to sell &c." And this is supported by the judicial interpretation of that act. *Cole* v. *Northwestern Bank, supra.*

Also, the English act permits a vendor in possession to sell or pledge to a *bona fide* purchaser or pledgee to the same extent that a mercantile agent may. This enacts the rule of the common law in force in many American jurisdictions, but which was not the law in England prior to the Act. Blackburn, Sales, Secs. 327, 328; *Johnson* v. *Credit,* Lyonnais Co., 3 C. P. D. 32.

Prior to the decision in the principal case there was a conflict in the rulings of the Courts of England and Massachusetts on the question who is an agent. In *Cairns* v. *Page,* 165 Mass. 552, a salesman of a jeweler received goods according to a custom of the jeweler to deliver goods to the salesman with authority to sell them either for cash or on conditional sale. It was held that the owner could not replevy the goods from a person to whom the salesman had pledged them; the salesman was "intrusted with the merchandise and had authority to sell." But in *Hastings* v. *Pearson,* (1893) 1 Q. B. 62 on facts substantially similar, the salesman was held not to be a mercantile agent, "apparently on the ground that the act applies only to persons ordinarily carrying on the business of mercantile agents." However, *Hastings v. Pearson* is expressly overruled by the unanimous decision of the Court in the principal case, which reconciles the decisions in England on this phase of the Act and accords with the interpretation of the similar statute in Massachusetts.

SLANDER.

Words imputing Unchastity Actionable: per se.

In *Cooper* v. *Seaverns,* 105 Pac. Rep. 509 (Kan., 1909) we have a striking example of judicial repudiation of a common law doctrine, as inapplicable to the needs of a modern American State. In an action for slander the declaration was laid in two counts, setting forth different words, alleged to impute unchastity to the plaintiff, a married woman, yet without an allegation of special damage. The court held that the words recited in the first count would not *per se* impute unchastity, and that the innuendo must be construed strictly, if extrinsic facts from which such meaning could be derived were not pleaded. This is in line with the decisions in other states on similar facts. *Claypool* v. *Claypool,* 56 Ill. App. (1894) 17; *Peters* v. *Garth,* 20 Ky. Law Rep. (1899) 1934. But having decided that the words in the second count did amount *per se* to such an accusation, the Court squarely asks the question "whether such words are actionable in this state without an allegation of special damage."

In an elaborate and carefully considered opinion the learned Justice points out that defect of the English common law, due to a division of the administration of justice between the law and ecclesiastical courts, which, until remedied by the Slander of Women Act, 54 and 55 Vict. C. 51 (1891), gave no remedy to a woman who had suffered unwarranted slanders upon her reputation unless she could prove special dam-

SLANDER (Continued).

age. He thus goes on to speak of the adoption of the common law into our system of jurisprudence and quotes from the general statutes of Kansas (pp. 8014) limiting such adoption to that part of it "as, modified by constitutional and statutory law, judicial decisions and the conditions and wants of the people" is suited to their needs. Since the reason for the English rule in regard to this species of slander was founded upon a system of jurisprudence totally different from that in force in this country, the learned Justice contends that the reason failing the rule must also fail, and consequently that that portion of the common law was never adopted in Kansas.

Since the Kansas Bill of Rights (Gen'l. Sta. 1901, pp. 93, 100) guarantees redress to "all persons for injuries suffered in person, reputation or property" and since such words are admittedly one of the grossest injuries that a modest woman can suffer, once the old rule of the common law is considered as abrogated, it is but a step to permitting an action for the use of such words *per se,* which is the final conclusion of this interesting case.

Other states have attained the same result, either directly by statutory enactment, or indirectly by considering that the words impute an indictable crime, statutes having constituted the offense charged as such. Cyc. of Law & Pro., Vol. 25, p. 319. But in the principal case the same result is reached forcibly and directly.

STATUTES.

Authority of Governor to Limit Appropriation Bills by Extraneous Agreements

In the case of *Lukens* v. *Nye,* 105 Pac. Rep. 593 (Cal. 1909) a rather unusual state of affairs was presented. The plaintiffs had a claim against the state for some $45,000 and a bill appropriating this amount to them was passed by both houses of the legislature, and presented to the Governor for signature. Considering the amount excessive, the Governor called in the plaintiffs and offered to sign the bill only on condition that they would make an agreement to accept $25,000 in full satisfaction, instead of the larger sum. They assented to this proposition, and executed a document along the lines indicated, and containing the provision that the Comptroller was to pay some $22,000 on January 1, 1906, and the balance of the $25,000 a year later. If he failed to do this the agreement was to be void. Acting on the faith of this paper, the Governor signed the bill, and the Comptroller paid the first installment. But the following year, when he tendered the plaintiffs the balance, they refused to accept it and began mandamus proceedings to compel the payment of the difference between what they had already received and the original appropriation of $45,000, the ground of their contention being that as the bill became a law by the Governor's signature, no agreement contrary thereto could be binding. The Supreme Court affirmed the judgment of the lower court, which sustained the plaintiff's argument. The opinion points out that the Governor's function of approving bills is a legislative, rather than an executive one, and that he must either approve the bill as presented to him *in toto,* or veto it, or allow it to become a law without his signature. His powers are carefully defined in the State Constitution in regard to these matters; the only discretion allowed him being his power to veto single items in appropriation bills, without vetoing the whole enactment. This power is granted by many

STATUTES (Continued).

state constitutions, *Comm.* v. *Barnett* 199 Pa. St. (1901) 161, but under them it has been held that a change in a bill devoted to a single appropriation voids the whole. *State* v. *Holder,* 76 Miss. (1898) 158.

The ground of estoppel was also advanced by the defendant, who claimed that since the Governor had been induced to sign on the faith of the agreement, the plaintiff should not be allowed to disavow it. It is well established, however, that the motive inducing the legislature to act cannot be the subject of judicial inquiry, *Cooley Con. Linn.,* 259; *People* v. *Glenn,* 100 Cal. (1893) at 423, and as has been pointed out, the Governor is a part of the legislature in the enactment of bills. The bill having become a law the moment it was signed, the agreement then became one contrary to public policy, as well as void for want of authority on the Executive's part to make it, and thus it would not act as an estoppel. *Tate* v. *Building Ass'n,* 97 Va. (1899) 70; *Rush* v. *San Francisco,* 80 Cal. (1889) 1.

If this were not the case, a tremendous power, not granted by the Constitution, would be given to a Governor to revise and defeat legislation; since agreements of this nature could always be drawn and later set up by way of estoppel, though directly opposed to existing legislation and public policy.

STATUTE OF FRAUDS.

Check Given for the Debt of Another

In the interesting case of *Mine & Smelter Co.* v. *Stockgrowers' Bank,* 173 Fed. 859 (1910), the defendant had agreed to loan a firm, Holdredge & Son, $20,000. Holdredge & Son owed the plaintiff $10,078 for goods bought, part of which had not been shipped and part of which were in transit. The defendant made a parol contract with Holdredge & Son and the plaintiff to pay the debt of Holdredge & Son by its cashier's check, to the amount of $5,870, by its note payable in three months for $3,813 and by paying $394 when certain goods were shipped to Holdredge & Son, in consideration that the plaintiff would ship these goods to Holdredge & Son, would release to them the goods in transit, and would dismiss a baseless action against the defendant. The plaintiff shipped the goods and dismissed the action. The defendant delivered its cashier's check, but refused to pay the check, and refused further to perform its parol agreement.

It will be seen that the defendant received no property and therefore could not be held at common law as a bailee. The defendant would, however, have been liable *in assumpsit* before the Statute of Frauds, the consideration being the plaintiffs' abandonment of their right of stoppage *in transitu.* But after the statute the mere existence of a consideration has never been held by the best judicial opinion to take a promise to pay the debt of another out of the statute. The case was therefore under this theory plainly within the statute.

The opinion decides that (apart from the check feature to be hereafter considered) the case is within the statute, giving as a reason that the main purpose and object was "no substantial benefit or advantage inuring directly to the promisor."

The question as to whether the consideration must appear on a note or check,—given as a guaranty or payment of another's debt, in order to satisfy the statute, was decided in the negative in *Edgerton* v. *Edgerton,* 8 Conn. 6 (1830) and in *Davidson* v. *Rothschild,* 49 Ala. 104. The contrary position, however, was taken in *Sumwalt* v. *Ridgely,* 20

STATUTE OF FRAUDS (Continued).

Md. 107 (1863) and in *Nichols, Shepard & Co.* v. *Allen,* 23 Minn. 542 (1877). As to how this fact would be decided in any given jurisdiction, it would seem that it would depend on the question whether that jurisdiction acknowledges or repudiates the doctrine of *Wain* v. *Walters,* 5 East. 10 (1804). The doctrine of *Wain* v. *Walters* (which is that the consideration must appear on the writing) is no longer the law of England in cases of guaranty, but it does express the law of many jurisdictions in this country in cases of guaranty as well as in other cases covered by the statute; *Underwood* v. *Campbell,* 14 N. H. 393; *Castle* v. *Beardsley,* 10 Hun. (N. Y.) 343; *Laing* v. *Lee,* Spencer (N. Y.), 337; *Weldin* v. *Porter,* 4 Houst. (Del.) 236; *Stephens* v. *Winn,* 2 Nott & McC. (N. C.) 372;; *Henderson* v. *Johnson,* 6 Ga. 390; *Patmor* v. *Haggard,* 78 Ill. 607; *Jones* v. *Palmer,* 1 Doug. (Mich.) 379; *Taylor* v. *Pratt,* 3 Wisc. 674. This doctrine was, however, repudiated in *Gillinghan* v. *Boardman,* 29 Me. 79; *Patchen* v. *Swift,* 21 Vt. 292; *Packard* v. *Richardson,* 17 Mass. 121; *Reed* v. *Evans,* 17 Ohio 128; *Halsa* v. *Halsa,* 8 Mo. 303.

The opinion in the principal case decides that the check was a good written contract, which was valid and enforceable under the Statute of Frauds.

It it interesting to note that in those jurisdictions which require that the consideration be expressed, a memorandum expressed to be "for value received" is held to state the consideration sufficiently for the purposes of the statute; *Cooper & Peabody* v. *Dedrick,* 22 Barb. (N. Y.) 516; *Day* v. *Elmore,* 4 Wisc. 190; *Miller* v. *Cook,* 23 N. Y. 495.

TRUSTS.

Bank Account: Withdrawals by Treasurer of a Depositing Corporation: Notice

In the case of the *Havana Cent. R. Co.* v. *Knickerbocker Trust Co.,* 119 N. Y. Supp. 1039, the plaintiff corporation had a deposit account with the Central Trust Company, subject to checks signed by V. as its treasurer. Between April 21, 1906, and June 15 following, V., as treasurer, drew three checks against an account payable to the order of another or himself, and signed with plaintiff's name by V., as treasurer, which V. indorsed in blank and deposited with defendant to the credit of his individual account. The defendant credited the proceeds to V.'s account, which it later permitted him to withdraw. It was decided that such checks were notice to defendant that plaintiff's treasurer was drawing its money for his individual benefit, and defendant having received the money from the drawee bank, received it to plaintiff's use and was liable to plaintiff therefor.

Where a person holding money or property in a fiduciary capacity pays or transfers it to a third person, with notice of his relation to it, for a purpose foreign to the trust, the third person cannot hold the property or money as against the true owner. *Robinson* v. *Chemical Nat. Bank,* 86 N. Y. 404 (1881.)

Knowledge that money was held by the debtor as agent causes one to receive such money at his peril, as the legal presumption is that an agent has no authority to dispose of the property of his principal in payment of his own debt. *Gerard* v. *McCormick,* 130 N. Y. 261 (1891).

The form of the check may be sufficient to put the defendant on notice. *Ward* v. *City Trust Co.,* 192 N. Y. 61 (1908.)

TRUSTS (Continued).

The doctrine of notice is applied in the following statement—one who takes a conveyance from a person whose name is followed by the word "trustee" in the document of title, and with knowledge that he is making the conveyance for his personal advantage, for example, to satisfy or secure his own debt, cannot hold the property against the defrauded *cestui que* trust. *Bank of Montreal* v. *Sweeny*, 12 App. Cas. 617; *Duncan* v. *Jandon*, 15 Wall. 165; *Manhattan Bank* v. *Walker*, 130 U. S. 267; *Shaw* v. *Spencer*, 100 Mass. 382; *Smith* v. *Burgess*, 133 Mass. 511; *Payne* v. *First Bank*, 43 Mo. App. 377.

A large number of cases in the Cent. Dig. Vol. 47, §529, under Trusts, sustain the proposition that any person receiving trust property with notice of its character takes the same subject thereto, and is chargeable therewith as trustee.

Scott, J., dissenting, argued that the defendant was a mere conduit through which the money passed, and the judgment holds it to a quite unreasonable responsibility. And further, that in all the cases relied on by the plaintiff, there has been present the fact, which is absent here, that the bank or individual to whom the diverted money was paid, received it in payment of a debt or in some other way reaped a benefit from the payment. When that fact is absent, a different rule has been applied in the following cases: *Batchelder* v. *Cent. Nat. Bank*, 188 Mass. 25; *Safe Deposit and Trust Co.* v. *Diamond Nat. Bank*, 194 Pa. 334; *Rhinehart* v. *New Madrid Banking Co.*, 99 Mo. App. 381; *Martin* v. *Kansas Nat. Bank*, 66 Kan. 655.

But it is submitted that this argument goes only to the extent of the consideration, and the doctrine of notice is just as strong in the case where the bank to whom the diverted money was paid received it in payment of a debt, or as the consideration for assuming a personal obligation to the agent individually.